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THE SCOPE OF THE RULE AGAINST UNJUST DIS- CRIMINATION BY PUBLIC SERVANTS.

I. AT COMMON LAW.

There has been a most remarkable absence of any scientific attempt, both upon the part of courts and of writers, to discover any criteria by the application of which the exact scope of the rule prohibiting unjust discrimination by public servants at common law may be determined. Furthermore, there has been no attempt to determine the fundamental principle upon which the decisions of many of the common law cases involving public service duties depend. This may be accounted for by the fact that in many of these opinions the common law obligation to *serve* the entire public and the distinct obligation to render such service without unjust discrimination have been almost inextricably confused, and the precise basis of the decision has been left obscured.

It shall be the purpose of this article to discuss the exact scope of this rule at common law, and its relation to the doctrine of the so-called "*Express Cases*"¹, and cognate decisions, in which the determination of the extent to which this rule is involved becomes of practical importance.

The rule prohibiting unjust discrimination is, at the beginning, to be distinguished from the rule requiring public service

¹ 117 U. S. 1 (1886).

companies to render service to all who apply. If A presents goods to a common carrier for transportation and the carrier refuses to accept them, there is a clear violation of the carrier's duty to render service. It may be that the carrier is performing the service for all others who apply, and for this reason by its refusal it has treated shippers unequally. On this account, perhaps, and because unjust discrimination likewise involved an inequality of treatment, though of a distinct type, courts have frequently said that a carrier guilty of such conduct was practicing "discrimination" or "unjust discrimination". Why two doctrines basically so distinct and dependent upon such diverse conditions should have become so confused solely through loose and careless nomenclature is a puzzling problem. Cases affirming one rule were cited in applying the other until the distinction between the doctrines themselves appears to have been lost sight of by many of the courts. As has been indicated in a previous article² the precise scope of this doctrine at common law becomes important in the application of the rule both at common law and under the Interstate Commerce Act.³ The problem, briefly stated, is this: Is there any test, which, when applied to concrete cases, will enable us to determine whether an alleged or admitted obligation upon the part of public servants comes properly under their duty to serve the public or under their obligation to refrain from unjust discrimination. Upon the decision of this point may depend the adequacy and efficiency of the remedy, the tribunal in which it is enforced, the measure of damages, and innumerable other important practical considerations.

Perhaps the first test that suggests itself is the rather obvious formula which might be expressed thus: Such services as a public servant is bound to render for A, irrespective of the fact that like services are afforded to or withheld from other members of the public, are obligations imposed under the public

² "The Origin of the Rule Against Unjust Discrimination," 66 *UNIV. OF PENNA. LAW REVIEW*, 123.

³ Act of Feb. 4, 1887, 24 Stat. at L., Ch. 104, p. 379; Comp. Stat., Sec. 8563.

servant's common law "duty to serve"; those obligations owed to A *solely* because such services or privileges are accorded to others similarly situated, arise out of the public servant's obligation to refrain from *unjust discrimination*. This test, it is submitted, is accurate. But as a working test it possesses the defect that it is not, in a certain sense, a test at all, but more accurately a definition, which when applied to concrete cases does not bear us far.

There is one test which, with two qualifications, appears to the writer to be perfectly sound. Fixing a point of division at the moment when services by the public servant to a patron begins, that is, when the service actually is commenced, any duty existing prior to that time is embraced within the servant's "duty to serve". It is only from that time forward that the field of "unjust discrimination" is opened.

This test does not imply that from the moment the service commences *all* further duties and obligations are embraced within and must be enforced under the servant's duty to refrain from unjust discrimination. Thus, a carrier's obligation to provide sufficient and appropriate facilities for transportation, often classed under a separate heading as the duty to furnish adequate facilities, is in reality merely an extension of the duty to serve, affecting the manner of service. This is an obligation arising after the service has begun under the test suggested above, and yet is embraced within the "duty to serve" and not within the "duty to refrain from unjust discrimination".

To put a concrete case, it may be supposed that a telephone company refuses to install a telephone for A upon request. This would clearly be a violation of its duty to render service, and the test above suggested applies since, under it, until a contractual relation between the servant and the one served is established, any common law duty in favor of the patron must be embraced within this classification. But its obligation to allow A a "flat" rate will depend, in cases where the rates offered are reasonable, upon the allowance of these "flat" rates to other patrons.⁴ The

⁴ Mr. Bruce Wyman, in his book on "Public Service Corporations," Sec. 1245, suggests that so long as the rates of a water company are substantially

elementary difference between the two obligations stands out clearly. The former is an absolute duty; the latter is relative. The former is a fairly fixed and determined obligation, varying only as the increasing complexity of commercial relations enlarges the duties of service incident to a public occupation; the extent of the latter duty is variable and arises out of a situation of inequality created at the volition of the carrier. The former is an obligation inherent in the character of the public service; the latter depends upon proof of certain conduct toward other patrons. The former duty is enforced by a mandatory order which leaves no discretion; the latter duty requires an alternative decree,—an option to render the demanded service or concession impartially or to abandon it entirely.⁵ The test suggested is subject to one criticism and to a single possible qualification. These will be considered in order.

The criticism of the test is that it is not entirely complete. Even assuming, as the test does, that all obligations arising prior to the moment service is begun are embraced within the duty to serve, what of those obligations which exist after the service has been undertaken? Are additional obligations embraced

equal under either system, a company may allow "flat" rates to some patrons and require payment according to meter by others. Most of these decisions are cases wherein the situations of the patrons differently treated were substantially dissimilar, and where the fact that one patron was a large user, such as a boarding house, or a wasteful user, was emphasized in justification of the unequal treatment. See *Shaw v. San Diego Water Co.*, 50 Pac. 693 (1907); *Robbins v. Bangor R. & Electric Co.*, 100 Me. 496 (1906); *Shaw Stocking Co. v. Lowell*, 199 Mass. 118 (1909); *State v. Gosnell*, 116 Wis. 606 (1907). The decision in *Powell v. Duluth*, 91 Minn. 53 (1903), seems questionable. In that case no dissimilarity between the circumstances of the patrons was alleged. It was found, however, that the rates under the two systems were substantially equal, and the court upheld a service rule that one having once elected to receive water under the meter system could not later demand a "flat" rate. It would seem that under a proper application of the common law rule a patron should be allowed to make his election at any time, provided only that he make compensation for any expense incident to the change.

⁵ *Great Northern Railway Co. v. Minnesota*, 238 U. S. 340 (1915); *Pennsylvania Co. v. United States*, 236 U. S. 351 (1915). But see *Louisville & Nashville R. R. v. U. S.*, 238 U. S. 1 (1915), wherein an order by the Interstate Commerce Commission, objected to because not in the alternative, was upheld. *The Great Northern Railway case*, however, unquestionably expresses the weight of authority. See also 64 UNIV. OF PENNA. LAW REVIEW, 301.

within the "duty to serve" or within the "duty to refrain from unjust discrimination"? To illustrate, is the duty to furnish ice for a shipment of perishable goods once it has been received a part of the carrier's duty to serve or dependent upon the fact that such service is rendered for others? In this type of situations the test does not assist. The existence or non-existence of such obligations not specifically imposed by statute is usually determined, step by step, through the medium of separate decisions;⁶ and under the terms of some modern statutes, to determine the exact basis of an obligation at common law is for some purposes academic; but in dealing with many of the more recently recognized branches of public service which frequently are not embraced within the terms of such statutes, the precise scope and nature of these two common law obligations is constantly important.⁷

As to duties existing prior to the time when service is begun, the test must be stated subject to one possible qualification. In the provision of facilities for service, a branch of the duty to serve, it is the acknowledged rule that a carrier or other public servant need only prepare to meet the demand for accommodations which can reasonably be foreseen, and that for failure to handle properly a sudden and unexpected influx of business he is not liable.⁸ Let it be supposed that because of a grain harvest of unusual and unprecedented magnitude a railroad experiences a serious shortage in cars, one that could not reasonably have been anticipated. May the railroad allot its entire equipment to those shippers whom it desires to favor, or must the burden created by the shortage be equalized by a *pro rata* distribution? It is well settled that the latter course is the obli-

⁶ A typical illustration of this method, and also of the custom of courts to vary the extent of such obligations according to physical conditions and the nature of the service, is seen in *Beard v. Illinois Cent. Railway*, 79 Ia. 518 (1890); *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873 (1890); *Ship "Maori King" v. Hughes*, 2 Q. B. 550 (1895).

⁷ Of such recently recognized public service occupations, news-gathering agencies and companies supplying ticker service are typical. *Shepard v. Gold & Stock Telegraph Co.*, 38 Hun. 338 (1885); *Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438 (1900).

⁸ *Joynes v. P. R. R.*, 235 Pa. 232 (1912).

gatory one.⁹ It is the duty arising before the service has begun, and would come, therefore, under our test, within the obligation to render the service. Under which obligation is the duty to apportion properly classed?

A study of the common law tends to indicate that whatever obligation to apportion exists arose through the obligation to refrain from unjust discrimination. Before this public service obligation had become fully established¹⁰ there was a tendency to hold that when a carrier's facilities were exhausted by an unusual demand he might employ the available facilities in the service of those whom he chose. Thus we find that it was a defense to a carrier in an action for refusal to serve merely to prove that his coach was full or that his available facilities were already occupied.¹¹ Even under the obligation to refrain from unjust discrimination the right and sometimes the duty to give preferences to certain kinds of freight is recognized.¹² But before the rule against unjust discrimination had become established, the right to impartial service when facilities proved inadequate was less secure.¹³

It would thus appear that the duty to apportion facilities in times of shortage arises from the duty to refrain from unjust discrimination, and not from the duty to render service. There is one recent case in the Supreme Court of the United States, however, which seems to indicate that the common law obligation to serve is broad enough to require an impartial apportionment of facilities.¹⁴

⁹ *B. & O. R. R. v. Pitcairn Coal Co.*, 215 U. S. 48 (1909).

¹⁰ The relative dates of the origins of these two doctrines are discussed in the writer's article on "The Origin of the Rule against Unjust Discrimination." See note 2, *supra*.

¹¹ *Lovett v. Hobbs*, 2 Shower 127 (1681). The court having held that a coachman was a common carrier "we were forced to give evidence of our coach's being full; our refusal to carry them; and that, without our knowledge at first, the porter put up the box behind the coach, which, when we perceived, we denied to take the charge of it."

¹² Thus it was held justifiable on the part of a railroad to give preference to relief supplies shipped to Chicago at the time of the great fire. *Michigan Central R. R. v. Burrows*, 33 Mich. 6 (1875); and it is generally held that there is a duty to give preference to perishable freight. *Tierney v. R. R.*, 76 N. Y. 305 (1879).

¹³ *Peet v. Chicago & Northwestern Ry.*, 20 Wis. 594 (1866).

¹⁴ *Pennsylvania R. R. v. Puritan Coal Co.*, 237 U. S. 121 (1914).

The opinion in this case is illuminating as an illustration of the manner in which courts frequently fail to specify which of these common law doctrines is involved and discuss the matter in general terms when the reasoning would be materially clarified if this point were definitely decided. The complaint consisted in the alleged failure to supply a shipper with a sufficient number of cars. It was urged in behalf of the railroad that this being an action for unjust discrimination in interstate commerce, resort must first be had to the Interstate Commerce Commission, and that in any event such a suit must be brought in an United States court, and not in the state court.¹⁵ As an instance of the deliberate confusion of the two doctrines, a portion of the opinion is well worth quoting:

"It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated as a suit for a breach of the carrier's common law duty to furnish cars, or an action for damages for the carrier's unjust discrimination in allotting cars to the Berwind-White Company, while at the same time refusing to follow its own rule and furnish them to the Puritan Company on the basis of mine capacity. In either case the liability is the same. For where the carrier performs its duty to A, and at the same time fails to perform its duty to B, there has been, in a sense, a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the court, is defeated because the breach of duty is also called an unjust discrimination.

"In the present case the pleadings contained no reference to the Interstate Commerce Act. The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a manufacturing plant, instead of the Berwind-White Coal Company. The plaintiff's cause of action and dam-

¹⁵ At the trial in the state court the plaintiff seems to have ignored his common law cause of action and a judgment was entered for the plaintiff for damages as for unjust discrimination. The Supreme Court of Pennsylvania, in affirming the judgment, found an offense three-fold in character: "(1) the offense against the common law. (2) an offense against the Pennsylvania Statute of June 3, 1883, making undue and unreasonable discrimination unlawful, (3) an offense against Sec. 3 of the Federal Statute regulating interstate commerce." See the opinion, p. 131.

ages would have been the same if the failure to receive cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks; or, if by reason of a negligent mistake they had been sent to the wrong point. The motive causing the short supply of cars was, therefore, wholly immaterial, except as corroboration of other evidence showing an actual shortage of cars, so that, if we ignore the plaintiff's characterization of the defendant's conduct, and consider the nature of the case, alleged in the first court and established by the evidence, it will appear that the Puritan Company was entitled to recover because of the fact that the carrier refused to comply with the common law liability to furnish it with a proper number of cars."

A little further on the court expresses the common law rule thus: "The law exacts only what is reasonable from such carriers, but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not, identically."

The case of an excusable inadequacy of facilities where the obligation to apportion exists is the only situation which has occurred to the writer where the test above suggested for determining the scope of the duty to serve may perhaps not prove accurate in application. It is a duty arising before service has been begun. Viewing the subject broadly, in the light of the decisions in which the duty to apportion has been recognized, it would appear that it has been founded upon the obligation to refrain from unjust discrimination. But in this recent Supreme Court case there is a suggestion that the "duty to serve" may have a broader significance in cases of inadequacy of facilities; namely, a duty to serve impartially where complete service is impossible. The above test, however, subject to this possible qualification in cases involving apportionment, constitutes, it is submitted, a criterion by which the character of a public service obligation, arising prior to the commencement of service, may be determined.

The confusion in the decisions involving the common law obligations to serve and to refrain from unjust discrimination has persisted to the present day. Of this a single case recently de-

cided by the Supreme Court of Massachusetts may be taken as strikingly illustrative, and a careful analysis of the decision may not be inappropriate.¹⁶ The facts, briefly stated, are these: A telegraph company purchased stock quotations from a stock exchange, and distributed them among stock brokers through the medium of a ticker service operated over its lines. Under its contract the telegraph company was to supply quotations only to brokers approved by the stock exchange. The stock exchange arbitrarily withheld its approval of a certain broker, who appealed to the Public Service Commission and secured an order compelling the company to supply them.

There are two grounds upon which the service might have been compelled under public service law.¹⁷ It might have been held that the furnishing of stock quotations by telegraph companies is a service incidental to the telegraph business; a collateral and related service so germane to that business that to accord it to one and refuse it to another similarly situated would amount to unjust discrimination in the conduct of that occupation. It might, on the other hand, have been held that the business of supplying ticker service, of itself, was so affected with a public interest that the obligations of public service should attach to it, under which theory the obligation to supply the quotations would have existed under the "duty to serve". The court took neither of these positions, but an intermediate and, it would seem, illogical one.¹⁸

¹⁶ *Western Union Telegraph Co. v. Foster*, 224 Mass. 365 (1916).

¹⁷ The Massachusetts statute prohibited "the extension of any rule, regulation, privilege or facility, except such as are specified in said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, services." Mass. St. 1913, Ch. 784, Sec. 20.

¹⁸ The mere fact that a public servant may entirely abandon a branch of service does not prove that his obligation to render service to all, while he professes to supply it, arises from his duty to refrain from unjust discrimination, and not from his duty to render service. *Commonwealth v. Fitchburg Railroad Co.*, 12 Gray 180 (Mass. 1858). But the fact that a decree is in the alternative, requiring uniform treatment or a total abandonment of the service, often indicates that the basis of the decree is unjust discrimination. See *Great Northern R. R. v. Minnesota*, 238 U. S. 340 (1915); *Chicago & N. W. Ry. v. People*, 56 Ill. 365 (1870); *Anacostia Citizens' Association v. B. & O. Railroad Co.*, 25 I. C. C. 411 (1912).

It first states that the commission's order was designed to prevent "unfair and unjust discrimination by the telegraph companies". Then comes language indicating that the court considered the service so intimately related to the telegraph business as to be embraced within the rule against unjust discrimination;¹⁹ which is followed by the statement, with authorities, that "telegraph companies exercise a public employment and are bound to serve all the public without discrimination." Up to this point the basis of the decision seems to be the rule against unjust discrimination.

But here the former ground appears to have been abandoned, and the theory adopted that the business of supplying ticker service is so affected with a public interest that the duty to serve all who apply is incident to it.²⁰ Next the court cites cases of which *State v. Bell Telephone Co.*²¹ is typical, wherein the right of a telephone company to refuse service to a member of the public because, under contract with the patentee of the telephone, it had agreed not to serve any patron not approved by the patentee, was denied. In such cases the refusal is very clearly and obviously a violation of the company's duty to serve, and the doctrine of discrimination is not involved. And finally, the court upholds the jurisdiction of the commission expressly on the ground that the business consists in "the transmission of

¹⁹ The court says, on p. 371: "The property acquired by the telegraph companies in the stock quotations has no value to them except as they use their public franchises, granted and exercised solely because, of the public service they are organized to render, in sending these quotations to financial centres for distribution by sale to their patrons. They are able to secure patrons in the case at bar solely through the exercise of their public functions in and under the streets of Boston. Such property, destined to such use as are the quotations, is as subject to public regulation in its use as are its other public functions. The property right is merely incidental to the public service function."

²⁰ Quoting from p. 372: "When such corporations have acquired rights in the disposal of which the public are interested, they must deal with those rights in accordance with the requirements of public regulations. The rights which these telegraph companies have acquired in connection with the quotations are beyond those merely incident to the transmission of intelligence from one person to another. They involve the distribution and dissemination of information as to which it has assumed far greater duties than those of simple transmission, and as to which its facilities growing out of its public character must be used."

²¹ 23 Fed. 539 (1885).

intelligence within the Commonwealth by electricity",²² a calling that is made a public service occupation by statute; and, as such, the duty to supply quotations would very clearly come under the duty to render service.

The foregoing case has been selected for detailed analysis because it is typical of dozens of others wherein the exact ground of the decision is equally obscure. It is true that in this particular case the same result would have been arrived at under either theory, and it may, perhaps, be urged that to insist upon such a distinction is hypercritical. But it is submitted that two doctrines, so fundamentally different, should so far as possible be kept separate; and had this attitude been adopted in the early cases it would unquestionably have contributed greatly to the certainty and clarity of the common law affecting public servants.

2. THE RELATION OF THE RULE OF THE EXPRESS CASES AND COGNATE DECISIONS TO THE RULE PROHIBITING UNJUST DISCRIMINATION.

The facts of the celebrated *Express Cases*²³ are now so familiar that a repetition of them here is not essential. The problem they presented was the right of a railroad company to make an exclusive contract with a single express company to operate upon its lines, and to exclude therefrom all other express carriers. The right to do so was affirmed.

Prior to the decision in this case, the identical problem had come before the highest court of three of the states, and a diametrically opposite conclusion had uniformly been reached.²⁴

²² Mass. St. 1913, Ch. 784, Sec. 2, gives the commission the power to regulate certain services, when furnished for public use, *inter alia*, "the transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto."

²³ 117 U. S. 1 (1886).

²⁴ *Sandford v. Railroad Co.*, 24 Pa. 378 (1855); *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188 (1869); *McDuffee v. R. R.*, 52 N. H. 430 (1873),

The same problem has arisen in cognate cases involving the right of a railroad company to give exclusive privileges to hackmen, baggage and transfer companies, and draymen, enabling them to enter the stations of the railroads or to come upon their premises for the purpose of soliciting patronage from incoming passengers. The right of an innkeeper to grant exclusively to one liveryman the right to come upon his premises to solicit baggage among his guests has been subject to litigation;²⁵ and whenever a public servant attempts to delegate an exclusive privilege in a matter relating to a duty, either active or passive, which it owes to the public, the same problem is presented.

Upon the whole subject there has always existed a conflict among the authorities, with the weight inclining more and more toward the federal view. With the respective merits of the diverse views upon this question the present article is not primarily concerned. They are discussed exhaustively in a learned article by Mr. Bruce Wyman.²⁶ But at the beginning it is necessary to state two propositions, which are hereinafter to be developed. The first is that whatever duty exists on the part of public servants to permit free competition among such concessionaries and to refrain from exclusive arrangements, where such a duty is recognized, is a duty incident to its obligation to the general public and not to the intermediate concessionaries, as such;²⁷ the second, that whatever obligation exists in such situation is one arising before service is commenced, and, under the test laid down in the preceding discussion, falls properly under

²⁵ *Markham v. Brown*, 8 N. H. 523 (1837).

²⁶ "The Public Duty of the Common Carrier in Relation to Dependent Services," *The Green Bag*, Vol. 17, p. 570 (1905). The substance of this article is embodied in Wyman, "Public Service Corporations," Vol. 1, Sec. 470 *et seq.*, where he discusses the advantages and disadvantages of what he terms the "conservative" and "progressive" or "radical" views.

²⁷ It is seldom that one finds the problem perceived as clearly as in *Hedding v. Gallagher*, 72 N. H. 377 (1903) at p. 394. The court there says: "The right of a hackman or a job-teamster to enter a railroad station in the prosecution of his business, when it exists, is derived from, or is included in, the passenger's right as against the railroad to reasonable means of transportation for himself and baggage, and is not a right derived from any duty which the corporation owes him directly as a connecting carrier." Starting with a clear conception of the problem involved the court discussed the proposition from this viewpoint.

the servant's duty to serve, rather than under its obligation to refrain from unjust discrimination.

The precise relation that this body of cases bears to the common law rule prohibiting unjust discrimination by public servants has both an historical and a present practical interest. In *Messenger v. Pennsylvania Railroad*,²⁸ frequently considered as first having laid down the rule against unjust discrimination in America²⁹ the three early "express" cases already cited³⁰ were referred to as the sole authority for the rule there announced.³¹ Furthermore, if the Pennsylvania case could properly be said to have been decided under the rule against unjust discrimination, it constitutes the earliest American case reciting that doctrine.³² Cases of this type have been cited repeatedly in opinions expressing the common law rule against unjust discrimination. While in problems relating to the obligations of railroads toward express companies, in the broad field of interstate commerce, the rule of the *Express Cases* controls,³³ and it is only in the relatively unimportant field of intrastate commerce that the local rules are still important; yet the same problem in the case of hackmen, baggage-men and draymen, and those engaged in kindred services, is still a live one, open in many jurisdictions, and, under decisions conflicting in principle, mooted in others.

It is submitted that the services to patrons that are usually delegated by public servants under exclusive agreements are divisible into three classes. Speaking in terms of its duty *to the public* and not to an intermediate concessionaire, one might put, in the first class, those services as to which the public servant owes an active duty. Thus it is generally believed, notwithstand-

²⁸ 8 Vroom (N. J.) 531 (1874).

²⁹ Writer's article on "The Origin of the Rule Against Unjust Discrimination." 66 UNIV. OF PA. LAW REVIEW 123.

³⁰ *Supra*, note 24.

³¹ The case *Audenried v. P. & R. R. R.*, 68 Pa. 370 (1871), was also cited, but it was not apropos, and only by a loose *dictum* supported the decision.

³² *Supra*, note 29.

³³ *Adams Express Co. v. Croninger*, 226 U. S. 490 (1912).

ing a *dictum* in an early case to the contrary,³⁴ that an obligation upon the part of railroads to provide for the expeditious transportation of small parcels exists, and that if no express company volunteered to perform the service the railroad itself would be compelled to undertake it. That there are no decisions but merely *dicta* to this effect is accounted for by the fact that since the demand for express service became general, companies anxious to supply it have not been wanting. It may therefore be considered an *active* obligation on the part of the servant.

In the second class are those services as to which is owed a passive obligation. It is the right of a member of the public arriving at a railroad station to be enabled, either at the station or in its immediate vicinity, to contract with hackmen for his transportation from the station and with transfer companies for the conveyance of his baggage.³⁵ But the duty of the railroad is merely passive and it need take no steps to further such facilities. Whether it must under its duty to the public permit the use of the station by all hackmen or others for soliciting trade, or whether it may admit one exclusively is a point upon which the cases split; but the duty is in this case not an active one, but merely one of *laissez-faire* or non-interference.

The third class embraces those services usually supplied under exclusive contracts as to which the servant owes no duty, either active or passive. These include the right to sell confectionery, newspapers, and magazines upon railroad property and the law is very clear and free from conflict that in such matters exclusive contracts are permissible.³⁶ This latter class of serv-

³⁴ In *Dinsmore v. L. C. & L. Ry.*, 2 Fed. 465 (1880), the earliest federal case upon the question of the obligation to accommodate express companies, the right of a railroad itself to carry express to the exclusion of express companies was denied, the court saying (p. 472): "It is enough to say that railroads were not created to do an express business, and possess no legal rights to engage in it, cannot be required to undertake and perform it, and, I may add, ought not to be permitted to engage in those branches of the express business *ultra vires* their corporate powers." See also: *Southern Express Co. v. Louisville & N. R. R.*, 4 Fed. 481 (1880); and *Southern Express Co. v. Memphis & L. R. R.*, 8 Fed. 799 (1881).

³⁵ *Old Colony Railroad v. Tripp*, 147 Mass. 35 (1888); *Griswold v. Webb*, 16 R. I. 649 (1889); *Hedding v. Gallagher*, 72 N. H. 377 (1903).

³⁶ *Old Colony Railroad v. Tripp*, *supra*, note 35.

ice obviously can bear no relation to the law prohibiting unjust discrimination nor the duty to serve, and may be dismissed without further comment. Aside from an occasional tendency on the part of the courts to reason by analogy that because exclusive arrangements may be made in such cases, they are also permissible in the type of cases symbolized by the "hack" cases, the rule has remained clear. It may be that in both types of cases exclusive arrangements should be permitted. But in the one case, at least, a duty, passive though it be, to permit the rendition of the service, exists; in the other, the service may be entirely eliminated.³⁷

Among the cases involving the rights of express companies, the *Express Cases*, which rank first in importance, are free from any suggestion of the rule against unjust discrimination. It was emphasized that such companies had in the past always been carried under special contracts, and the fact that they had not held themselves out as "common carriers of express companies" ³⁸ was alluded to, but the court seems to have perceived clearly that whatever duty existed was owed directly to the public, as it says: ³⁹ "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations."⁴⁰ It cannot, however, be said that the opinion in this case gives due advertence to the arguments opposed to its conclusion and the possible

³⁷ See *ibid.*, p. 39.

³⁸ At p. 21.

³⁹ At p. 24.

⁴⁰ Certain English cases are sometimes erroneously referred to as opposed to the rule of the *Express Cases*. In these cases it was held that a carrier who collected small parcels from individual shippers and shipped them in a single "packed" parcel was entitled to the same rates charged individual shippers for large parcels, and need not pay the rate on each parcel separately. See *Pickford v. Grand Junction Ry.*, 10 M. & W. 399 (1842); *Great Western Railway v. Sutton* (1869), L. R. 4 H. L. 226. In the United States, under the Interstate Commerce Act, it was likewise held that a carrier had no right "to make the ownership of goods the criterion by which his charge for carriage is to be measured," and that a forwarder who collected goods from others for shipment was entitled to a reduced carload rate equally with individual shippers. *Interstate Commerce Commission v. Del.*, L. & W. R. R., 220 U. S. 235 (1910).

right of the public to demand a situation free from the extorsive tendencies of monopolistic privilege. The earlier "express" cases already referred to which had reached the opposite conclusion were neither cited nor commented upon;⁴¹ and a long line of cases in the lower federal courts, some of them carefully reasoned, were not mentioned.⁴²

In the three early "express" cases in the state courts, the idea of a duty of public servants to serve carriers acting in the capacity of concessionaires and the duty to refrain from unjust discrimination among carriers is confused. In *Sandford v. Railroad*,⁴³ the earliest of these, the conception that the public may be entitled to the benefits of free competition among concessionaires seems to shine through. Chief Justice Lewis at one point says: "The power to regulate the transportation on the road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to others. Competition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly of any branch of business." But the court concludes its opinion in the following words: "like the customers of a grist-mill they have a right to be served, all other things equal, in the order of their applications. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law and void." These final sentences summarize the basis of the decision and are admittedly ambiguous. While the possible right of the public to freedom from monopoly was suggested, the final conclusion appears to have been worked out in terms of the railroad's obligation to the carriers themselves. The analogy of the miller referred to connotes an obligation to accommodate all express carriers

⁴¹ *Supra*, note 24.

⁴² *Dinsmore v. Louisville, etc., R. R.*, 2 Fed. 465 (1880); *Southern Express Co. v. Louisville, etc., R. R.*, 4 Fed. 481 (1880); *Texas Ex. Co. v. Tex. & R. R. R.*, 6 Fed. 426 (1881); *So. Ex. Co. v. Memphis & L. R. R. Co.*, 8 Fed. 799 (1881); *Wells etc., v. Oregon, etc., R. R.*, 18 Fed. 667 (1883); *Wells, etc., v. Oregon R. & Nav. Co.*, 19 Fed. 20 (1884); *Wells, etc., v. North. P. R. R.*, 23 Fed. 469 (1884). See 5 L. R. A. (N. S.) 783.

⁴³ 24 Pa. 378 (1855).

who apply as part of its duty to *serve* such carriers; the following portion suggests that the duty may arise solely because such service is accorded other carriers, under the obligation to refrain from unjust discrimination.

In *New England Express Co. v. Maine Central Railroad*⁴⁴ the principle applied by the court in arriving at the same decision is less obscure. While the language at times confuses the actual theory adopted by the court, it appears to be included in these words: "The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application."⁴⁵ Here again no possibility of the right of the public who are patrons of express carriers to insist upon free competition among them is hinted at. Neither is the rule against unjust discrimination relied upon. The obligation is created upon the theory that there is a duty on the part of the railroad to render service to carriers, as such, just as the duty existed to serve individual members of the public in other situations.

Chief Justice Doe in *McDuffee v. Railroad*,⁴⁶ the last and most exhaustively considered of the early "express" cases, discusses thoroughly the various obligations of common carriers.⁴⁷ The precise ground of the decision, is stated more clearly and unequivocally than in either of the former decisions. "A railroad corporation" it was held, "carrying one expressman, and enabling him to do all the business on the line of their road, *do hold themselves out as common carriers of expresses*;"⁴⁸ and

⁴⁴ 57 Me. 188 (1869).

⁴⁵ *Ibid.* p. 196.

⁴⁶ 52 N. H. 430

⁴⁷ The opinion presents a striking example of the loose use of the term "discrimination" when a dereliction in the duty to serve is intended, and a general confusion of the two ideas. The term "unequal preference" and "unreasonable discrimination" are used (at pp. 448, 9) to describe a violation of the carrier's duty to serve; and also of the right to equality, as freedom from "unreasonable and injurious discrimination in respect to terms, facilities or accommodations."

⁴⁸ Italics are the writer's.

when they unreasonably refuse, directly or indirectly, to carry more public servants of that class, they perform this duty with illegal partiality." It assumes that when a railroad once admits a single express company it undertakes as a part of its public profession the carriage of all express companies desiring it; a conclusion against which the fact that express privileges are granted under special contracts strongly militates. In the *Express Cases* the precise question was framed and the opposite conclusion reached.⁴⁹ The *McDuffee Case* recognizes a duty to serve express companies and upon this bases its decision.⁵⁰

The cases wherein the problem in regard to express facilities has arisen are few, and these decisions being among the earliest merit careful analysis as to their basis. The clearly logical view of more recent acceptance is that any duty which a railroad owes is to the general public, and not to any specific class of the public such as express carriers, which are in turn engaged in public service. Whether their duty to the public, the ultimate shippers, requires that they permit free competition among expressmen, or whether their duty to the general public is performed when they have supplied the "reasonable express accommodations" of the *Express Cases* under an exclusive and monopolistic arrangement, there is room for a difference of opinion; and a split exists. A doctrine that they clearly do not involve is the rule against unjust discrimination. But the earliest of these cases⁵¹ relied upon that doctrine in reaching its decision. The latter two⁵² were grounded upon the carrier's "duty to serve," but upon an erroneous application of the doctrine in conceiving a duty to serve express carriers, as such, where the

⁴⁹ 117 U. S. 1 (1886), at p. 26.

⁵⁰ In *Sargent v. Boston & Lowell R. R.*, 115 Mass. 416 (1874), decided a year later, the same problem was presented. The question here, however, was whether a railroad could exclude all express companies from its lines and conduct that business on its own account. The problem of unjust discrimination therefore could not arise and the question of a duty to serve was flatly presented. The court decided that no such duty existed. The rule was later altered in Massachusetts by statute. *Kidder v. Fitchburg R. R.*, 165 Mass. 398 (1896).

⁵¹ *Supra*, note 43.

⁵² *Supra*, notes 44 and 46.

only duty that exists is toward the public at large. The failure to perceive the difference between a duty to the public through their relations with independent carriers, and their duty *qua* these carriers themselves, has caused much confusion; a difficulty born, perhaps, of the fact that, irrespective of the one to whom the duty was properly owed, as a common law proposition, before the advent of the modern commission, it was almost invariably the concessionaire who sought to enforce it, whether in his own right or in behalf of an aggrieved public.⁵³

The same problem is arising constantly in modern times in a multitude of situations wherein the right of a public servant to grant an exclusive contract with a concessionaire rendering a related service is questioned. Among these are baggage, hack, and draying privileges at railroad stations, stock yards, grain elevators, ticker service and other similar vocations.⁵⁴ There should be no difficulty in applying the rule in these cases. A jurisdiction which approved the rule of the *Express Cases* would naturally be expected to permit exclusive contracts for supplying hack service; while a jurisdiction which adopted the attitude of the *McDuffee Case* in the instance of express companies, would be expected to compel free competition among hackmen, baggagemen and draymen. This result, however, has frequently failed to follow.

⁵³ This hypothesis does not appear to have been commented upon in this country, but some of the early English cases throw an interesting light upon it. In *Barker v. Midland Ry.*, 18 C. B. 46 (1856), a case wherein the right of an omnibus driver to come upon the ground of a railroad station was at issue, Crowder, J., said: "This is not an action brought by a person wishing to travel by the defendants' railway or to send goods by it; but by a person who carries to and from the railway persons who are desirous of using or who have used the railway. He is clearly not a person who can complain of an obstruction." And in *Ex parte Painter*, 2 C. B. (N. S.) 702 (1857) where it was alleged that the service supplied under existing exclusive contracts was not entirely sufficient, Creswell, J., said: "I am of opinion that no ground is presented to justify the interference of the court. Before we put the powers of the act in motion, we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is bona fide made on behalf of the public"; to which Williams, J., added: "The complaint must come from those who use the railway."

⁵⁴ For a discussion of the law concerning these services with authorities, see Wyman, "Public Service Corporations," Vol. 1, Sec. 481, *et seq.*

It is entirely understandable that the two situations might well be distinguished for practical reasons. Theoretically, if free competition is demandable in one, it is equally demandable in the other. In each of these situations the public servant owes a duty, active or passive. It may be, as the *Express Cases* hold, that this duty is satisfied by a monopolistic delegation of the privilege; or it may be that it requires free competition. But, since the same duty exists in each case, the situations are analogous, and in theory the decision should be the same. It is entirely possible that for *practical* considerations the rule applicable to express companies might not, for example, be properly suited to the case of hack service. It may be that in practice efficient service demands monopoly in the one case and free competition in the other. And, if the courts, acknowledging frankly the similarity of the duty and the theoretical analogy in the two situations, had decided that for practical reasons a different rule should be applied to this or that occupation, their attitude would have been entirely consistent. Instead, a different result has frequently been reached in the same jurisdiction either by denying the analogy and applicability of the theory, or by entirely ignoring the case announcing the contrary doctrine. A result that might plainly have been justified upon frank practical reasons is rendered illogical by an attempt to distinguish the cases on theory.

The Supreme Court of the United States has consistently followed the principle of the *Express Cases* and permitted exclusive contracts in the case of hacks.⁵⁵ There, as in the *Express Cases*, the argument of convenience, a practical consideration, was emphasized. It was pointed out that in a station of the size of the Union Passenger Station of Chicago, the inevitable congestion due to the frequency of arriving and departing trains, and the number of people accommodated, made it highly important that the confusion incident to the solicitation of passengers by competing hackmen be avoided. The preponderance of authority in most of these incidental services inclines toward

⁵⁵ *Donovan v. Pennsylvania Company*, 199 U. S. 279 (1905).

the federal rule, and because of the respect accorded decisions of the Supreme Court of the United States, the adoption of this rule is becoming more and more general.⁵⁶

The minority view represents a position that is far from indefensible, and one in favor of which a great deal may be said. It is perhaps best set forth in *Montana Union Railway v. Langlois*,⁵⁷ an opinion that is noteworthy because the existence of a duty to the public, so frequently lost sight of, is clearly recognized. Mr. Justice Harwood there says that "the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands, and receive compensation therefor."⁵⁸

A study of the position of the English courts reveals at an early date a curious reversal of attitude. In *Parker v. Midland Railway Company*⁵⁹ it was held that no action could be maintained by an omnibus proprietor for a refusal to admit him to a station yard. Half a year later a case arose in which a railroad had granted the proprietor of a certain omnibus the exclusive privilege of entering their grounds to receive or discharge passengers. The court held that in the absence of proof that public convenience required this exclusive arrangement, the "balance of convenience" was against the public, and that equal accommodations must be given.⁶⁰ An exclusive arrangement is

⁵⁶ *Old Colony R. R. v. Tripp*, 147 Mass. 35 (1888); *Kates v. Atlanta Baggage Co.*, 107 Ga. 636 (1899).

⁵⁷ 9 Mont. 419 (1890).

⁵⁸ *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194 (1890).

Mr. Wyman, arguing against the view of the *Donovan* case, says: "The right of the passengers to have ingress to the station by any carriage that he chooses to employ nobody dares to deny; it is very hard to see any essential difference from the obligation to give egress without discrimination." Wyman, *Public Service Corporations*, Vol. 1, Sec. 486. But the right of a hack ordered in advance by telephone or otherwise, by an arriving passenger, to enter the station grounds to secure its fare, is equally established, even in jurisdictions where exclusive contracts are permitted, and it is submitted that this is the true analogy. That a right should exist to enter the premises to solicit among arriving passengers does not necessarily follow.

⁵⁹ 18 C. B. 46 (1856).

⁶⁰ *In re Marriott*, 1 C. B. (N.S.) 499 (1857). While the language of the opinion is concerned chiefly with the right to enter the grounds with passengers, the rule, which was made absolute, required access for "for-

regarded as an undue and unreasonable preference which must bring some compensating advantage to the public to justify its existence. But a few months later the opposite result was reached by stating the rule conversely. A similar arrangement, *because not shown to be detrimental to the public*, was upheld;⁶¹ and the same rule was reiterated a few days later, namely, that public inconvenience must be shown to avoid an exclusive arrangement, a position contrary to the earlier view that an exclusive agreement constitutes a preference which is *prima facie* bad, and requires a compensating public advantage to justify it.⁶²

It has been pointed out that logically there is no distinction in theory between the express cases and the hack and other cognate cases, and that if in any jurisdiction for practical reasons a different result is desired in the one service than in the other, such a departure should be justified wholly upon practical considerations.

In New Hampshire, the jurisdiction which in the *McDuffee Case*⁶³ required equal facilities for all express companies, an earlier case had carried the same doctrine to an unusual extent. There has been a tendency to relieve the modern innkeeper from many of his burdens as a public servant, and no modern regulation of rates for inns having been attempted, it seems doubtful whether the modern innkeeper would still be considered a public servant even to the extent of obliging him to receive travelers, were it not that such a liability has traditionally and historically, from very early times, attached to that profession. The court held, however, that an innkeeper could not admit the driver of one stage-coach line upon his premises for the purpose of soliciting patronage among his guests and deny the right to another.⁶⁴ As an extension of the public service obligation to innkeepers

warding, receiving and delivering traffic—to the same extent as other public vehicles of similar description.”

⁶¹ *In re Beadell*, 2 C. B. (N. S.) 509 (1857).

⁶² *Ex parte Painter*, 2 C. B. (N. S.) 702 (1857).

⁶³ *Supra*, note 24.

⁶⁴ *Markham v. Brown*, 8 N. H. 523 (1837).

this case is probably extreme; yet together with the *McDuffee Case*, it shows the attitude of the New Hampshire court in preventing monopolistic arrangements by public servants with persons performing related services.

In view of this authority, the baggage problem, when it arose in the same state, was hardly treated as one might have expected. In *Hedding v. Gallagher* the court held that a railroad might exclude all baggage carriers except one from its station.⁶⁵ Here again a distinction might have been made for practical reasons such as convenience, but instead there is an attempt to distinguish the cases on theory and to establish an abstract right, apart from practical considerations, to exclude all carriers save one. In distinguishing *Markham v. Brown* the court compares the situation in that case to the right of a guest at a hotel to receive a business caller. The falsity of the analogy is patent. Both the coach driver seeking patronage at the hotel and the baggageman at the depot are *public servants* and not private business guests. It may be that arbitrary exclusion should be permitted in both cases or in neither; but in theory it is vain to attempt to distinguish them.⁶⁶

The court's attempt to distinguish the case on principle from the New Hampshire and Maine express cases is no more logical. That the express companies seek contractual relations with the railroad cannot be material. The duty on the part of the railroad in this case is an active affirmative one for which they are entitled to compensation: the duty in the baggage case is a passive one and the mere payment of compensation according to a contract or schedule under the first case does not alter the principle. The essential fallacy of the argument, it is submitted, is revealed in this conclusion: "It is sufficient for present pur-

⁶⁵ *Hedding v. Gallagher*, 72 N. H. 377 (1903).

⁶⁶ The court says, on p. 389: "The right of a guest to receive callers, while being entertained in a hotel, is quite different from the right of a passenger, when alighting from a train, to be importuned by a crowd of unnecessary job-teamsters." This loses sight of the fact that the particular "caller" concerned was a public servant, and that the exclusion was in each case attempted by a party owing public service duties; and *non constat*, that the presence of more than one stage-driver was quite as "unnecessary" as the presence of a plurality of baggagemen.

poses that these cases (express cases) do not sustain the proposition, that if the railroad allows one man to do a *private*⁶⁷ business in its station it must not exclude others who desire the same privilege." This entirely loses sight of the fact that the business of the baggage-man is a public and not a private occupation.⁶⁸

The fact that the public servant receives compensation for the grant of the exclusive privilege is not material and should occasion no difficulty. The situation is not analogous to that where a demand is made upon a public servant for the use of its facilities by a rival engaged in the same business, who demands the use of the first servant's facilities in order to compete with him. In the present type of cases the servant is receiving compensation for an exclusive privilege granted in a distinct form of public service, collateral to and not competitive with the service which it renders. In *Jenks v. Coleman*,⁶⁹ Mr. Justice Story decided that a steamboat company which had a pecuniarily valuable contract with a stagecoach line might exclude from its boat an agent who solicited passengers for a rival stage line. Cases of this type are clearly sustainable under the principle that a carrier's obligation only extends to the carriage of *bona fide* passengers or travelers, and that he is not bound to permit solicitation in the business of baggage transportation, or any other business, whether he is or is not pecuniarily interested therein, by passengers on his train or other conveyance.⁷⁰ In *Slute v. Steele*⁷¹ a decision diametrically opposed to that of *Markham v. Brown* was reached, and the right of an innkeeper

⁶⁷ At p. 391; italics are the writer's.

⁶⁸ One possible ground for distinguishing the express case is suggested; namely, that "the railroad's public duty of equal treatment relates only to persons or corporations, having business relations with it in the matter of railroad transportation." It is true that the express cases involve *railroad transportation*, and that the baggage and hack cases do not. But it is difficult to conceive of this distinction as other than arbitrary; and even conceding it, it fails to explain the *Markham case*.

⁶⁹ 2 Sumner 221 (U. S. C. C. 1835).

⁷⁰ See, "The D. R. Martin," 11 Blatch. 233 (1873); *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301 (1876); Story, *Bailments*, 9th Ed., Secs. 591, 591a; Angell, *Carriers*, Sec. 530.

⁷¹ 106 N. C. 766 (1890).

to prohibit the solicitation of business on his premises by all livery-stable proprietors save one, who paid for the exclusive privilege, was affirmed. The court distinguished the *Markham Case* on the ground that there it did not appear that any pecuniary loss to the innkeeper was involved, while in this case such an injury necessarily resulted.⁷²

In *Kalamazoo Hack & Bus Co. v. Sootsma*⁷³ the Supreme Court of Michigan held that free competition among hackmen could be demanded. In a later case in the same jurisdiction the opposite conclusion was reached, and a novel view taken of the effect of the receipt of compensation by the railroad for the privilege.⁷⁴ A carrier engaged in the transfer of baggage complained that a rival was given free passes and that his agents were permitted to ride on the trains to solicit baggage from passengers, while this privilege was denied the complainant. After stating that the weight of authority was opposed to the *Kalamazoo Hack Case*, the court says that the present case is not within its principle, for in the former case it appeared that the contract between the railroad company and its lessee was one which resulted in profit to the company, while in the case at bar no consideration for the privilege was shown; it even appeared that the transportation to solicitors was furnished free. The case might well have been decided without any attempt to distinguish it from the earlier decision on the ground that no *duty* exists on the part of the railroad to permit baggage solicitors on its trains; that the situation is precisely analogous to the news-stand and fruit-stand problem, in which no duty, active or passive, exists on the part of the carrier, and in which case he may withhold favors in the form of exclusive concessions, or

⁷² There is an additional ground upon which the cases might possibly have been distinguished. The liveryman was not a public servant but was engaged in a private business, and the case in this respect differs from that of the stagecoach, telephone, and transfer company. As to the presence of consideration, a certain consideration, at least a profit to the innkeeper, was present in the *Markham Case* as it appears that the favored drivers boarded and kept their teams at the inn, while the rivals did not.

⁷³ 84 Mich. 194 (1890).

⁷⁴ *Dingman v. Duluth, etc., Ry.*, 164 Mich. 328 (1911).

bestow them where he will.⁷⁵ The Michigan case distinguishes this case from the earlier decisions by presuming from the absence of compensation in the latter case that the arrangement was solely for the benefit of the public. A monopoly bestowed purely out of favor is as likely to be an arbitrary and pernicious one, as is one founded upon consideration. The latter case is in principle squarely opposed to the earlier one, and may be said in substance, if not in terms, to overrule it.

The most recent state to reverse its attitude on this problem is Pennsylvania. Quite recently the Superior Court of that state departed from the rule laid down regarding express carriers in the early case of *Sandford v. Railroad*,⁷⁶ and upheld a contract by a railroad giving to a certain hackman the exclusive privilege of coming upon its station grounds to solicit business;⁷⁷ and this in a case where it appeared that there was ample space for competing hackmen, where there was no congestion, and where it appeared that if excluded from the railroad premises rival hackmen could not approach nearer than twelve hundred feet from the station.⁷⁸ While the *Sandford Case* was cited in behalf of the rival hackman, it does not appear whether the precise analogy in theory between the two cases was insisted upon.

Neither in the opinion of the lower court nor of the Superior Court on appeal is the *Sandford Case* adverted to. In both opinions reliance appears to have been had chiefly upon *Donovan v. Pennsylvania Company*⁷⁹ in which the Supreme Court of the United States arrived at the same conclusion. But the latter case had applied the federal rule of the *Express Cases*, a view which the Pennsylvania courts had in the *Sandford Case* flatly opposed. It had for some time been the opinion of many lawyers in Pennsylvania that the rule of the *Sandford Case* no longer represented the law. The *Graham Case*, by ignoring

⁷⁵ Wyman, Public Service Corporations, Sec. 501.

⁷⁶ *Supra*, note 24.

⁷⁷ Lehigh Valley R. R. v. Graham, 64 Super. (Pa.) 437 (1916).

⁷⁸ Appellant's Paper Book, p. 81 (No. 242; Oct. Term, 1915).

⁷⁹ 199 U. S. 279 (1905).

it and laying down a rule opposed in theory, and by adopting the doctrine of the federal courts, may be considered by implication to have overruled it.

The situations in theory are identical. In both cases a public duty, active or passive, is owed; and while the hack case might have been distinguished on the ground that however similar the two situations were in theory, practical considerations present in the hack case were sufficiently persuasive to justify monopolistic agreements which the express situation did not justify, in the recent Pennsylvania case the arguments of convenience and avoidance of congestion, circumstances strongly emphasized in the *Donovan Case*, were absent.⁸⁰

It is beside the purpose of this article to enter upon a discussion of the respective merits of the conflicting views upon this problem.⁸¹ This aspect of the question is an economic rather than a legal one and occupies a position of great importance in the law of public service. From the foregoing sources, however, it is submitted that these conclusions may be deduced: That whatever duty is owed by public servants in the situations just discussed is a duty owed to the public in general and not to intermediate concessionaries, as such; and this is a conception that was at first overlooked or repudiated, and has only recently received judicial recognition; that the duty owed in this type of cases, under either of the opposing views, comes within the purview of the servant's duty to render service and is not incident to its duty to refrain from unjust discrimination; and, lastly, that the problem, in a great number of situations, is still unsettled, the cases arriving at different conclusions in situations analogous in theory, frequently by ignoring the analogy, by unsound distinctions on theory, and without frankly basing their decision upon a differentiation warranted by consideration of practical expediency.

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⁸⁰ *Phila. & Reading Ry. v. Godfrey*, 28 Pa. C. C. 326 (1903).

⁸¹ *Supra*, note 26.